United Parcel Service, Inc. *and* John Kenneth Nick.
Case 16–CA–13471

February 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On November 16, 1988, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, and Respondent does not except, that the Respondent violated Section 8(a)(1) of the Act on February 24, 1988,[1] by threatening retaliation against the Charging Party, John Kenneth Nick, for filing the charge in this case. The judge, however, found that the Respondent's issuance of a written warning to Nick for his stopping deliveries and returning to the UPS center early on January 6 was not a violation of Section 8(a)(1) and (3) of the Act. The judge assumed, without deciding, that Nick's activity on January 6 was concerted, but concluded, based on the contractual no-strike clause,[2] that Nick's activity was unprotected. For the reasons set forth below, we find that Respondent has violated Section 8(a)(1) of the Act.

The Respondent is engaged in the handling and delivery of parcels nationwide. This case involves its Tulsa, Oklahoma facility. Nick had been a parcel-delivery driver at the Tulsa facility for almost 5 years. On January 6, 5 to 6 inches of snow fell, causing Nick difficulties in delivering in his area of south Tulsa, which consists of both hilly and flat terrain. About 11 a.m., after Nick had made 10 deliveries, he telephoned his supervisor, Clyde Brister, and advised Brister that the streets on his route were slippery and dangerous; that he had no control over his truck; that he was almost involved in some accidents; and that his truck had been stuck on several occasions. He also told Brister that the driving conditions were making him nervous, and causing him to experience stomach cramps. Brister told Nick that if he could not deliver the parcels, to return them to the center.

After delivering two next-day air packages, Nick returned to the center without completing his route. On arriving at the center, another supervisor, James Brown, gave Nick some paperwork to do, which took about 10 minutes. Nick testified that Brister then came over to him and told him to go home because he was sick. Nick responded that the reason he brought his load back was because the hazardous road conditions made it too dangerous to deliver, not because he was sick. Brister testified that on hearing that Nick was not sick, he told Nick that he had delivery work for Nick to do. Nick replied that he did not want to deliver because the roads were too hazardous. According to Brister, he then told Nick that ''if he wasn't going to deliver then he could punch out and go home sick as far as [he] was concerned.'' Nick punched out and went home.

On January 7, Brister informed Nick that he would be receiving a warning letter for bringing his load back the day before. Nick protested that he should not receive a warning because the working conditions had been dangerous, and he simply had followed the collective-bargaining agreement.[3] The warning letter was issued on January 14, and Nick filed the charge in this case on February 17.

On January 7, the road conditions were as bad or worse than the day before. Nick again objected to driving under those conditions. When Brister ordered Nick to make his deliveries, however, Nick complied and completed his route.

Under these facts, we find that Nick's voicing to the Respondent of his concerns about unsafe driving conditions was concerted activity under *Interboro*.[4] The *Interboro* doctrine establishes that when an employee invokes rights that are embodied in a collective-bargaining agreement, he is acting not only in his own interest, but in the interest of all the employees covered by that agreement.

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court endorsed the Board's *Interboro* doctrine:

> As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that

[1] All dates refer to 1988 unless otherwise indicated.

[2] Art. 48, sec. 1, *Grievance*, of the collective-bargaining agreement contains the following no-strike provisions:

> The Union and the Employer agree that there shall be no strikes, lockout, tie-up or legal proceedings without first using all possible means of a settlement provided for in this Agreement, of any controversy which might arise.
>
> . . . .
>
> The Union and its members individually and collectively agree that if there is any strike, stoppage, slowdown of work, picketing, or work interference of any form or kind, for any reason whatsoever during the term of this Agreement, the Employer may discharge, or otherwise discipline any employee or employees who may participate, instigate, actively support, or give leadership to such activity.

[3] Art. 18, sec. 1 of the collective-bargaining agreement provides, in part:

> Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to a person or property or in violation of a government regulation relating to safety of person or equipment. The term ''dangerous conditions of work'' does not relate to the type of cargo which is hauled or handled.

[4] *Interboro Contractors*, 157 NLRB 1295 (1966).

> he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity . . . . [465 U.S. at 837.]

In this case, we find that this dual standard articulated by the Court has been met. First, the record establishes that Nick's actions were based on ''a reasonable and honest belief that he was being, or had been, asked to perform a task that he was not required to perform under the collective-bargaining agreement.'' As noted above, article 18, section 1 of the collective-bargaining agreement stated that ''[u]nder no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to a person or property.'' Given the weather and road conditions on January 6, we find that Nick honestly and reasonably believed that his continued driving constituted a violation of that provision.

In this regard, the record reveals that Nick honestly believed that the road conditions were too hazardous for him to continue driving on January 6. There were 5 to 6 inches of snow on the ground at the time, and it continued to snow. Schools were closed and, as stated by the judge, life in general was disrupted. It is undisputed that there were some areas on Nick's route with steep grades. Nick, whom the judge found to be a credible witness, testified that he had problems handling his vehicle because the snow was ''so deep in places that it was causing his truck to swerve from one side of the road to the other.'' He testified that he had gotten stuck 12 to 15 times and that he observed at least 40 vehicles stuck or in ditches on his route. Nick also testified that he told Brister that the streets on his route were slippery and dangerous; that he had no control over his truck; that he had almost been involved in numerous accidents; and that his vehicle had gotten stuck many times. From these same facts we find that Nick's belief that his continued driving posed a significant hazard was reasonable.[5]

The record further establishes that Nick's stated concerns ''were reasonably directed toward the enforcement of a collectively bargained right.'' Nick testified that in the January 7 meeting with Brister, he told Brister that he could not be given a warning letter for failing to finish his deliveries the day before because he was following the collective-bargaining agreement.[6] Thus, although Nick had not referred to the collective-bargaining agreement in his January 6 conversations with the Respondent, his explicit reference to it on January 7 clearly communicated to the Respondent Nick's attempt to enforce his rights under that agreement.

For these reasons, we find that by voicing his concerns about the hazardous driving conditions on January 6, Nick was engaged in concerted activity. See *Ryder Truck Lines*, 287 NLRB 806 (1987), *Bechtel Power Corp.*, 277 NLRB 882 (1985), *Airlines Transportation Co.*, 277 NLRB 288 (1985).

Having found that Nick engaged in concerted activity under *City Disposal*, we must determine if Nick's activity was protected. The judge found that Nick's activity was unprotected because of the contractual no-strike clause. We find, however, under the facts of this case, that we need not reach the issue of the effect of the no-strike clause. Rather, we find that, even assuming that Nick's activity was unprotected, the Respondent condoned Nick's failure to complete his deliveries on January 6.

The doctrine of condonation applies where there is clear and convincing evidence that the employer has agreed to forgive the misconduct, to ''wipe the slate clean,'' and to resume or continue the employment relationship as though no misconduct occurred.[7] ''The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven.[8]

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[5] Contrary to our dissenting colleague, we find that a remand on this point is unnecessary. The judge credited Nick, thereby allowing us to make the necessary factual findings based on Nick's testimony. Further, we are satisfied that these factual findings provide a sufficient basis to establish that Nick's belief was reasonable. Even assuming the correctness of our colleague's observation that ''hindsight shows that it is likely that [Nick] could have made [his deliveries],'' such inquiry is unwarranted under *City Disposal*, in which the Court stated that ''an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.'' 465 U.S. at 840.

[6] Nick's testimony in this regard was as follows:

> Q. Again, what I'd like for you to do is tell us as close as you can recall, beginning with the . . . beginning with the beginning and go to the end of the conversation, what was said by anybody in the room. A. I think it started with Clyde [Brister]. He told me I was going to receive a warning letter for bringing my truck back the day before due to the working conditions that I was under. And I replied . . . .
>
> Q. Did he say what type of condition or just . . . .
>
> A. Just dangerous working conditions.
>
> Q. Go ahead.
>
> A. And I replied that he couldn't give me a warning letter for that reason because it was stated in our contract, you know, that . . . you know, I was trying to follow the contract is what I was trying to do. And I said he shouldn't be able to give me a warning letter for that reason.
>
> Q. Did you . . . you say you were following the contract, or thought you were following the contract. What Article are you talking about, if you remember?
>
> A. Article 18.
>
> JUDGE LINTON: (To the witness) And when were you trying to follow the contract?
>
> THE WITNESS: The day before.
>
> JUDGE LINTON: All right. Thank you.

[7] *Kohler Co.*, 128 NLRB 1062, 1105 (1960), enfd. in part and remanded sub nom. *Auto Workers Local 833 v. NLRB*, 300 F.2d 699 (D.C. Cir. 1962), cert. denied 370 U.S. 911 (1962); *NLRB v. Colonial Press*, 509 F.2d 850 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975); *NLRB v. Community Motor Bus Co.*, 439 F.2d 965 (4th Cir. 1971); *Teamsters Local 805 v. NLRB*, 312 F.2d 108 (2d Cir. 1963); and *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960).

[8] *Packers Hide Assn. v. NLRB*, 360 F.2d 59, 62 (8th Cir. 1966).

The essential elements of condonation are present here. When Nick voiced his concerns about hazardous driving conditions to Brister on January 6, Brister gave Nick permission to stop deliveries and return to the center early. Brister did not order Nick to continue making his deliveries nor did Nick refuse to continue them. Further, when Nick returned to the center and communicated his reluctance to make further deliveries because of the road hazards, Brister announced that in that case he could ''punch out and go home sick.'' Thus, Brister gave Nick permission to return to the center and leave work without completing his route, and Nick's failure to complete his work was acquiesced in by Brister.[9]

Under these circumstances, we find that the Respondent has condoned Nick's actions. Once an employer condones an employee's activity, it cannot use any unlawful or unprotected aspect of that activity as a basis for discipline. See *General Electric Co. (Hotpoint)*, 292 NLRB 843 (1989), *Davis & Burton Contractors*, 261 NLRB 728 (1982); *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 102 (7th Cir. 1971); *Richardson Paint Co. v. NLRB*, 574 F.2d 1195, 1202–1203 (5th Cir. 1978).

Having found that Nick's activity on January 6 was concerted and that even if it were unprotected, it was condoned by the Respondent, we find that the Respondent's January 14 warning letter to Nick for having engaged in this activity violated Section 8(a)(1) of the Act.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Parcel Service, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

''(b) Disciplining employees who engage in protected concerted activity within the meaning of Section 7 of the Act.

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Remove from its files any reference to the unlawful written warning issued to John Kenneth Nick, dated January 14, 1988, and notify that employee in writing that this has been done and that the warning will not be used against him in any way.''

3. Substitute the attached notice for that of the administrative law judge.

[9] We note that on January 7 Brister ordered Nick to make his scheduled deliveries, and Nick complied with this order.

[10] In view of this conclusion, we find it unnecessary to pass on whether the Respondent's warning letter additionally violated Sec. 8(a)(3) of the Act.

MEMBER OVIATT, concurring and dissenting.

Contrary to the majority, at this juncture in the case I would not find that the Respondent violated Section 8(a)(1) by issuing employee Nick a written warning for his stopping work and returning to the UPS center early on January 6. Instead, I would remand the proceeding to the judge to determine if Nick was engaged in concerted activity. Whether Nick acted out of an honest and reasonable belief that he was invoking his contract rights is a question best answered by the trier of fact, and the judge here did not answer this question.

I also find that Nick's activity was not unprotected. I write separately on this question to explore the effect of the contract's no-strike provision.

I. CONCERTED ACTIVITY

A finding of concerted activity under *NLRB v. City Disposal*, 465 U.S. 822 (1984), would require evidence that Nick's ceasing delivery was based on both an honest and a *reasonable* belief that the road or driving conditions were so hazardous that he was being asked to perform a task he was not required to perform under the collective-bargaining agreement. The judge found that Nick's action was unprotected because it violated the no-strike clause. Thus, he did not consider the concerted nature of the activity or analyze the facts necessary to make such a finding. In order to find that Nick's activity was concerted, it is first necessary to identify language in the collective-bargaining agreement on which he could have reasonably relied to support his ceasing deliveries on January 6. Without attempting definitively to interpret the parties' intent, I believe that article 18, section 1,[1] reasonably could be read to support Nick's actions. But the fact that Nick may have had a contract clause to rely on does not conclusively resolve the question whether he engaged in protected concerted activity. The circumstances surrounding his activity and other clauses of the contract must be considered (see the discussion under II, below).

Most importantly, the Board must still decide whether there is an adequate basis for concluding that Nick acted in a subjectively honest and objectively reasonable manner in ceasing his deliveries. The judge did not resolve this issue. He presented in his decision only a ''quick look at the factual highlights,'' finding it ''unnecessary to summarize all the facts.'' The judge also stated that ''*[h]ad I resolved all the issues, it is quite possible* that I would have found that Nick (whom I find credible) honestly believed road condi-

[1] Art. 18, sec. 1 of the collective-bargaining agreement provides, in part: Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to a person or property or in violation of a government regulation relating to safety of person or equipment. The term ''dangerous conditions of work'' does not relate to the type of cargo which is hauled or handled.

tions were dangerous on January 6, 1988 within the meaning of article 18 of the CBA.'' The judge's finding that Nick was a credible witness may lend support to a finding that his actions were ''honest.'' I do not believe, however, that we can conclude from the objective evidence that his actions were necessarily ''reasonable.'' The evidence relied on by the majority shows that the weather and driving conditions in Tulsa on January 6 were bad, and that Nick experienced considerable difficulty in making deliveries on his route. The record also reveals, however, that of the 100 drivers dispatched from the Tulsa UPS facility on January 6, Nick was the only driver to return his load and to refuse to deliver because of the weather and road conditions. On that day, in the State of Oklahoma, UPS dispatched a total of 327 drivers, with no accidents reported. As the judge noted, although Nick could not say how he would have fared had he not stopped making deliveries on January 6, hindsight shows that it is likely that he could have made them.[2]

In addition, the record shows that the weather and road conditions were as bad on January 7 as they were the day before. Indeed, the conditions may have been worse—5 to 6 additional inches of snow fell on the night of January 6. Nick drove as ordered on January 7 and, although he again allegedly had trouble controlling his vehicle, he returned to the center as scheduled without an accident.

I believe, therefore, that it is better that the judge who has observed the witnesses and heard the evidence first hand, and not the Board, consider the record evidence relating to the concerted nature of Nick's activity, and make the factual findings necessary to determine if Nick's belief was both honest and reasonable. That, however, does not finally resolve the case because, even if concerted, Nick's stopping his deliveries may have been unprotected.

II. THE NO-STRIKE PROVISION

If Nick's actions were in fact concerted, I would find, contrary to the judge, that they did not constitute a contractually prohibited work stoppage or strike, and thus that they did not lose their protection under the Act. The grievance procedure set out in article 48[3] of the agreement prohibits a work stoppage ''for any reason whatsoever.'' To read that, however, as rendering Nick's conduct unprotected would be to read out of the agreement any reasonable interpretation of article 18. The situation here was not one where Nick could work and then grieve. Rather, if the driving conditions were treacherous, serious bodily injury or property damage could have resulted before any grievance process could have been invoked.[4] It cannot be presumed that the parties to the collective-bargaining agreement anticipated and approved any such result merely because the article 18 rights were not specifically preserved in article 48.[5] Assuming arguendo that application of article 48 would render Nick's concerted activities unprotected, I agree with the majority that the Respondent by its actions condoned Nick's refusal to deliver on his route, and could not later lawfully discipline him for his actions.

III. CONCLUSION

In conclusion, although agreeing with the majority that Nick's action was protected, I would remand the case to the judge for further findings on the concerted nature of Nick's actions.

[2] Contrary to the majority's implication, I do not rely on hindsight to determine the reasonableness of Nick's activities. I consider all the evidence to show that this mixed question of fact and law is a close one, and that for this reason, if for no other, the trial judge—not the Board—should make the initial determination concerning the reasonableness of Nick's actions.

[3] Art. 48, sec. 1, Grievance, of the collective-bargaining agreement contains the following no-strike provisions:

> The Union and the Employer agree that there shall be no strikes, lockout, tie-up or legal proceedings without first using all possible means of a settlement provided for in this Agreement, of any controversy which might arise.
>
> . . . .
>
> The Union and its members individually and collectively agree that if there is any strike, stoppage, slowdown of work, picketing, or work interference of any form or kind, for any reason whatsoever during the term of this Agreement, the Employer may discharge, or otherwise discipline any employee or employees who may participate, instigate, actively support, or give leadership to such activity.

[4] *Paperworkers Local 5 (International Paper)*, 294 NLRB 1168 fn. 25 (1989).

[5] Therefore, art. 48 does not run counter to a finding that Nick's actions were concerted. See sec. I, above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to retaliate against you with specified reprisals should you file unfair labor practice charges with the NLRB against UPS.

WE WILL NOT discipline or otherwise discriminate against employees who engage in protected concerted activity within the meaning of Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any reference to the written warning to John Kenneth Nick dated January 14, 1988, and WE WILL notify him that this has been done and that the warning will not be used against him in any way.

UNITED PARCEL SERVICE, INC.

J. O. Dodson, Esq., for the General Counsel.
William D. Curlee, Esq. (Lytle, Soule & Curlee), of Oklahoma City, Oklahoma, for the Respondent.
John Kenneth Nick, of Owasso, Oklahoma, for himself.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This discipline case (written warning) arises from package driver John Kenneth Nick's decision to return with the balance of his load to the Tulsa center at noon on January 6, 1988. Nick considered that snowfall had made driving too dangerous on his route in south Tulsa. UPS issued a warning letter to Nick because of his action. Finding that the contractual no-strike clause renders Nick's action unprotected, I dismiss the discipline allegation of the complaint. Respecting a second allegation, I find UPS unlawfully threatened Nick with retaliation because he filed the unfair labor practice charge in this case, and I order UPS to cease and desist from such unlawful conduct.

This case was tried before me in Tulsa, Oklahoma, on June 20–21, 1988, pursuant to the April 1, 1988 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed February 17, 1988, by John Kenneth Nick (Nick or Charging Party), against United Parcel Service, Inc. (Respondent, UPS, or the Company).[1]

In the complaint the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act on February 24 by threatening Nick with retaliation for filing the instant charge, and Section 8(a)(1) and (3) of the Act on January 7 by issuing Nick a written warning because he returned early to the terminal, or center, on January 6 without completing his assigned deliveries.

By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A New York corporation with an office and warehouse in Tulsa, UPS is in the business of storing, handling, and delivering parcels. During the 12 months preceding issuance of the complaint, UPS received gross revenue exceeding $50,000 from the interstate transportation of freight. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Teamsters Union Local 516 (Union, Teamsters, or Local 516) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

The principal allegation here is whether UPS, by Division Manager Walt Swiderski, violated Section 8(a)(1) and (3) of the Act by issuing a warning to Tulsa package driver John Kenneth Nick on January 14. After referencing article 49 of the collective-bargaining agreement,[2] the text of the warning reads (G.C. Exh. 4):

> On January 6, 1988 at noon you brought your load back to the center after delivering 12 stops and told the supervisor that it was unsafe to continue working. You were the only driver on this day that brought back a load.
>
> Any future occurrence of pulling your load in and not completing your day will result in termination of employment.

As amended at the hearing (1:7-8),[3] complaint paragraph 11(a) quotes the text of the warning, and UPS admits that factual allegation. Complaint paragraphs 12 and 13 further allege that UPS violated Section 8(a)(1) and (3) by issuing the warning (1:6-7).

Nick returned early to the center because, in his opinion, weather conditions rendered road surfaces hazardous and driving too dangerous to continue with his assigned deliveries. There is no dispute that there were 5 to 6 inches of snow on the ground and that it snowed lightly through the day and that night. Newspaper articles in evidence describe the effects of the winter storm in vivid detail. Schools were closed, the Oklahoma legislature could not meet, and life in general was disrupted. The weather conditions the following day, January 7, were as bad or worse than the day before. Nick drove on January 7 only because he received a direct order to do so from his supervisor, Clyde Brister (1:47, 96; 2:221, 276–277).

The parties agree that this case calls for an application of *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), and the opinion of the Sixth Circuit on remand, *City Disposal Systems v. NLRB*, 766 F.2d 969, (6th Cir. 1985). Going further, however, UPS contends this case is controlled by the contractual no-strike clause. The General Counsel does not address the effect of that clause. Because I agree with UPS that the no-strike provision controls, I find it unnecessary to

[1] All dates are for 1988 unless otherwise indicated.

[2] The collective-bargaining agreement embodies the National Master United Parcel Agreement (arts. 1 through 42) and the United Parcel Service Southern Conference Supplemental Agreement (articles 43 through 67) covering several Teamsters locals, including Local 516. The collective-bargaining agreement is effective 8–1–87 through 7–31–90 (G.C. Exh. 2).

[3] References to the two-volume transcript of testimony are by volume and page.

summarize all the facts. Discussion of the threat allegation calls for the usual summary of the facts relevant to that issue.

The pleadings establish that since May 1, 1982, Teamsters Union Local 516 has been the designated exclusive bargaining representative of the employees in the unit described below, and since May 1, 1982, UPS has recognized Local 516 as such representative. Such recognition has been embodied in a collective-bargaining agreement which, as I have noted, has a term commencing August 1, 1987, and expiring on July 31, 1990.

The pleadings also establish that the recognized and appropriate bargaining unit is:

> All drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), car washers, and United Parcel Service employees in the employer's air operation, excluding guards and supervisors as defined in the Act.

B. *The January 14, 1988 Warning Letter to Nick*

1. January 6, 1988

A quick look at the factual highlights reveals the following facts. Nick has worked for UPS in Tulsa as a package or parcel delivery driver for almost 5 years (1:14). UPS dispatched 100 parcel drivers in its Tulsa Division on January 6 (2:243; R. Exh. 2 at 2).[4] During the relevant timeframe Clyde Brister was Nick's immediate supervisor (1:18, 130). Nick's assigned delivery area is located in south Tulsa, in the generally residential Southern Hills area, about 12 to 13 miles southwest of the UPS center (1:15, 54; R. Exh. 4). The area has some steep grades. It also has some nearly flat terrain in an area he was to service on January, but to get there would mean attempting to drive up streets with an incline of 15 to 20 degrees (2:266, 285).

A typical day begins at 8:55 a.m. with a meeting, known as a PCM, before departing 15 to 20 minutes later on their delivery routes. Information and safety matters are discussed with the drivers at the PCMs. The day ends when they complete their deliveries and return to the center. They arrive back at the center, or terminal, around 6:30 to 7:30 in the evening (1:16–17, 21–22). Each morning at the close of the PCM one of the supervisors, or the center manager, leads the drivers in a ritualistic chanting of the following slogan (1:22):

> I REFUSE TO ALLOW MYSELF
> TO GET INTO A SITUATION
> THAT COULD CAUSE ME TO BE
> INVOLVED IN AN ACCIDENT
> OR INJURY TODAY.

The slogan appears on a card (G.C. Exh. 3) which UPS distributed to the drivers some months before the hearing. However, Nick is uncertain whether the distribution came before January 6 (1:23, 32). Division Manager Swiderski could not recall either, although he appears to suggest the card and its slogan may have been in use by December 1987 (1:173–174). In any event, Nick testified the slogan had nothing to do with his returning early on January 6 (1:75). I understand Nick to mean the card and the slogan, not the concept. On January 6 Nick was concerned about safety. At the PCM that January 6 the drivers were instructed to return by 6 p.m. to avoid the weather conditions after dark (2:229–230).

After departing about 9:17 a.m. for his route on January 6, Nick observed about 20 vehicles in the ditch as he was enroute to his area, and at least another 20 stuck in the Southern Hills area on his route (1:24, 62; R. Exh. 6). Nick testified that the deep snow caused his vehicle to swerve and slide. His van got temporarily stuck 12 to 15 times (1:24, 60; 2:267). About 11 a.m. Nick telephoned his supervisor, Clyde Brister, and reported his difficulties. He told Brister that the streets on his route were slippery and dangerous, that he had no control over his truck, that he had almost been involved in numerous accidents, that his vehicle had gotten stuck many times, that all these conditions were making him nervous and causing him stomach cramps, and that he thought it was ridiculous for him to be out there. Brister said that if Nick could not deliver the parcels to return them to the center. Nick delivered the two next-day air packages he had before returning to the center about noon (1:25–27, 62, 82; 2:268). Nick had delivered to 10 business customers on his route before he called Brister (1:63, 78; R. Exh. 6). It seems clear Nick had more stops to make and parcels to deliver, but the record does not show how many.

There seems no dispute that in conversations Nick had with supervisors on his return to the center, Nick linked his early return to his concern over safety. Supervisor James E. Brown admits that much and asserts that Nick referred to a regulation by the Department of Transportation (DOT). After 10 minutes or so, Supervisor Brister approached Nick. Their versions differ as to what was said, but I need not resolve the dispute. The material point is that under both versions Nick referred to the hazardous road conditions. Nick testified he told Brister the reason he brought his load back was because conditions in his area were too dangerous for him to be there, and that Brister said Nick was sick and for Nick to go home (1:30–31).

According to Brister, after learning that Nick now felt fine he told Nick he had work for Nick to do but it was on the road delivering the same as 100 other drivers were doing. Nick said the roads were too hazardous and he did not want to deliver. Brister said Nick could punch out and go home sick (1:134–135). There is a dispute whether Nick again punched his card (he had punched out earlier and then was given some paperwork for a few minutes), but all agree he left at this time. Nick testified that when he returned on January 6, 1988, weather and driving conditions, were, in his opinion, dangerous to his safety and that of the public (2:270).

Tony Sapienza, labor relations manager for UPS in its Oklahoma district, identified certain business records in testifying that on January 6 UPS dispatched 327 package car drivers throughout Oklahoma on January 6. They delivered over 45,400 packages to 20,000 customers, picked up nearly 24,300 packages from over 6300 customers, and not one driver was involved in an accident (2:241–242; R. Exh. 2).

[4] The figure of 100, supported by the Company's business records, is perhaps more accurate than Nick's estimate that around 30 drivers worked at the Tulsa terminal in January (1:16). On the other hand, it may well be that Nick's center has no more than 30 drivers, but that there are other centers in the Tulsa Division employing another 70 drivers.

There were two accidents in Oklahoma that day, neither in Tulsa, and the vehicles involved were tractor trailers (2:241). For its Tulsa Division that January 6, UPS dispatched 100 package car (or Metro) drivers. Averaging 91 stops each, the drivers delivered 14,632 packages to 6619 customers and picked up 10,710 packages from 2515 customers, all with no accidents (2:243; R. Exh. 2 at 2).

2. January 7, 1988

Following the PCM the morning of Thursday, January 7, Supervisor Brister told Nick to get a union steward and come to the office. Nick located Rodney C. Scheffler, a union steward and package car driver, and Scheffler accompanied Nick to the office meeting (1:33; 2:210, 219). Present at the office meeting were Nick, Scheffler, Brister, and two center managers, Jim Cunningham and Mark Kelly (1:34; 2:220).

Brister informed Nick he was going to issue him a warning letter for bringing his load back the previous day. Nick said Brister should not be able to do that because the weather conditions were bad, he felt working conditions were dangerous, that he was simply following the contract (collective-bargaining agreement) when he brought the truck in early because of dangerous working conditions, and he felt he had followed the correct course. Brister said it was not Nick's decision to make. Nick replied that he thought it was his under the contract. The morning of January 6, Nick added, the Oklahoma Highway Patrol had broadcast an appeal for everyone to stay off the streets unless they had an emergency. Cunningham remarked that the Highway Patrol always said that. Brister said Nick would get a letter (1:35–37, 76; 2:220–221).

Article 18, section 1, of the collective-bargaining agreement provides, in part (G.C. Exh. 2 at 21):

> Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or dangers to a person or property or in violation of a government regulation relating to safety of person or equipment. The term ''dangerous conditions of work'' does not relate to the type of cargo which is hauled or handled.

Nick testified he was trying to follow article 18 of the collective-bargaining agreement on January 6 (1:35–36).

Following the meeting, apparently immediately thereafter, Nick and Brister had a short conversation in the presence of Scheffler. Nick told Brister he did not want to drive on the streets that day because of the working conditions, and that he would not do so unless ordered. ''I order you to go out,'' Brister replied. With that, Nick departed for his route and, pursuant to adverse weather instructions to all drivers that morning, returned that evening at 6 (1:39–40, 47–48; 2:221). Nick testified he drove that day only because of the direct order, fearing he could be discharged for failing to obey (1:96; 2:269, 277).

Weather and road conditions were as bad on January 7 as they were on January 6, and perhaps worse in view of the 5 to 6 inches of snow that fell Wednesday night (1:31, 38, 72; ;2:270). On January 7 Nick observed as many disabled vehicles as he did the day before, including some left from January 6 (1:38–39). Although Nick again had trouble controlling his vehicle, he was able to make 30 stops in the same area he was scheduled to drive on January 6, and he returned at 6 p.m. as scheduled without having been involved in an accident (1:39, 73; 2:272–276; R. Exh. 5 at 3–4). Nick could not say how he would have fared had he not returned early on January 6 (2:276–277). Hindsight shows that it is likely he could have made it.

3. The January 14, 1988 warning letter

Earlier I quoted the January 14 warning letter issued to Nick by Division Manager Swiderski. Nick testified that the letter was mailed to him at his home (1:38). Article 49 of the collective-bargaining agreement, which is the reference subject of the warning letter, pertains to ''Discharge or Suspension.'' (G.C. Exh. 2 at 77.) With certain specified exceptions, article 49 provides that at least one written warning must be issued to an employee before he can be suspended or discharged. On January 24 Nick met with Swiderski, Supervisors Brister and James E. Brown, and Hayward Hill, Nick's center manager, at Nick's request. Swiderski was new at his position, and basically Nick requested Swiderski to withdraw the warning. Swiderski declined. There is a point or two in dispute about the contents of the meeting, but it is not necessary for me to summarize all the meeting or resolve any of the differences.

Article 48, section 1, *Grievance*, of the collective-bargaining agreement contains the following no-strike provisions (G.C. Exh. 2 at 74, 75):

> *Section* 1
>
> The Union and the Employer agree that there shall be no strikes, lockout, tie-up or legal proceedings without first using all possible means of a settlement provided for in this Agreement, of any controversy which might arise.
>
> . . . .
>
> The Union and its members individually and collectively agree that if there is any strike, stoppage, slowdown of work picketing, or work interference of any form or kind, for any reason whatsoever during the term of this Agreement, the Employer may discharge, or otherwise discipline any employee or employees who may participate, instigate, actively support, or give leadership to such activity.

4. Discussion

The collective-bargaining agreement's no-strike paragraphs make no provision for permitting a work stoppage over an alleged violation by UPS of article 18 and the ''dangerous conditions'' of work clause. Thus, UPS argues, even if Nick's stopping work was concerted under *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), his action was unprotected. I agree.

Had I resolved all the issues, it is quite possible that I would have found that Nick (whom I find credible) honestly believed road conditions were dangerous on January 6, 1988, within the meaning of article 18 of the collective-bargaining agreement. The test of reasonableness is applied from the standpoint of what an ordinary person in his position could see and know. Aside from the weight to be assessed respecting Respondent's statistical evidence of 100 drivers averaging 91 stops that day, that statistical evidence is of no more than marginal relevance. Its only link to relevance is that

Nick does not claim other drivers were returning to the center, yet he could have ascertained, when he called Brister, whether other drivers were ceasing their deliveries. From the standpoint of weight the statistical evidence has only marginal value because Nick's route was in the hilly area in southern Tulsa. Thus, it is quite possible that the evidence points toward a finding that Nick reasonably believed further driving was excessively hazardous. Nick successfully drove all day (until 6 p.m.) on January 7. But hindsight is not the test for reasonableness. If that were the test, then employee belief in this respect would have to be more than merely reasonable, it would have to be correct. As the Sixth Circuit notes, correctness is not the test for concerted activity. *City Disposal*, ibid.

''On the other hand, if the collective-bargaining agreement imposes a limitation on the means by which a right may be invoked, the concerted activity would be unprotected if it went beyond that limitation. See supra at 837.'' *City Disposal*, supra at 841. At its earlier reference point at pages 837–838 the Court observed that an employer was free to protect itself by negotiating a no-strike clause. UPS did just that.

Whether all this seems fair to a driver in Nick's position on January 6, 1988, is beside the point. The point is that Nick and other members of the bargaining unit are bound by the contract negotiated on their behalf by the Union. The collective-bargaining agreement has no ''dangerous conditions'' of work exception to the no-strike clause. I note that article 18, section 1, of the collective-bargaining agreement provides for a ''Climatic Conditions Committee'' G.C. Exh. 2 at 23. That committee may review severe climatic conditions that may seriously affect employees in different geographic areas and issue binding decisions. The parties did not address this provision in the evidence presented at the hearing.

Assuming that Nick's action on January 6, 1988, was concerted, I find it was unprotected. Accordingly, I shall dismiss the complaint to the extent it alleges that UPS violated Section 8(a)(1) of the Act by issuing the warning to Nick. As for the 8(a)(3) allegation, the parties do not address motivation in their briefs. The General Counsel does not list it as one of the issues (Br. at 12) and neither does UPS (Br. at 5). The evidence does not specifically address motivation. To the extent motivation is covered in the record, the evidence is insufficient to show an unlawful motivation. Nick is a member of the Union, but membership in the Union is required after the statutory period. Oklahoma apparently is not a right-to-work state. Nick has filed grievances, but the evidence does not expand on that fact. I shall dismiss the complaint to the extent it alleges a violation of Section 8(a)(3) of the Act.

C. *The Alleged Threat of February 24, 1988*

1. Evidence

Nick filed his charge in this case on February 17.[5] Complaint paragraph 11(b) alleges that about February 24 UPS, by Swiderski, asked Nick what the unfair labor practice charge was about and then threatened Nick ''with retaliation.'' UPS denies the allegation.

On February 24 Swiderski met with Nick and Union Steward Rodney Scheffler. Swiderski testified he sought a meeting with Nick to find out what union activities he was talking about in his charge (1:153). Nick wanted a union steward present. Initially Swiderski said no but eventually agreed (1:40–42, 154). All three participants testified before me about the meeting, Nick as a General Counsel witness and Swiderski and Scheffler as witnesses called by UPS. During the course of the direct examination of Scheffler, UPS took the position it could address questions to Scheffler under Fed.R.Evid. 611(c). The General Counsel objected, but I overruled the objection (2:214). Scheffler's description is consistent with Nick's.

Nick testified that when Swiderski asked him what his unfair labor practice charge was about Nick replied that Swiderski should know since he had signed the warning letter. Swiderski said he was taking it personally. Nick and Scheffler both said he should not because it was not meant to be personal. Nick said he did not want to lose his job over this, but just wanted the warning letter gone. Swiderski responded, ''Well, you know, your name is in lights now with UPS.'' Swiderski added that anyone who brought a load back under similar conditions would receive discipline. That about ended the conversation. (1:42–44, 79–80, Nick; 2:211–212, 217–218, Scheffler.)

On cross-examination Nick testified (1:80–81):

> Q. And he [Swiderski] didn't say anything to you at all about any kind of disciplinary action with regard to your having filed the unfair labor practice charge, did he?
>
> A. He didn't put it in those words, no sir.
>
> Q. Well, what did he say?
>
> A. When I told him I didn't want to lose my job or cause any problems because of this, he looked at me and said that my name was in lights with UPS now.
>
> Q. What did you understand him to mean by that?
>
> A. That my job was in jeopardy.
>
> Q. Okay. Do you know what he was referring to? Do you know what he was referring to when he said your name is up in lights?
>
> A. That's what I thought he was referring to.
>
> Q. Okay. Your . . . you thought what?
>
> A. It's my opinion.
>
> Q. You thought he was referring to what?
>
> A. That my job was in jeopardy.
>
> Q. He didn't say that, though, did he?
>
> A. He didn't say my job was in jeopardy.

Swiderski denies making a statement about Nick's name being in lights (1:156). According to Swiderski, when he asked Nick why had he filed the charge, Nick said it was not against Swiderski. Instead, according to Swiderski, Nick began listing wrongs supposedly done him in the past by Brister and other supervisors. Swiderski testified he never ascertained what discrimination Nick meant by his charge and so he, Swiderski, simply dropped his inquiry. During the conversation Swiderski said that if Nick brought another load back that Swiderski would have to take disciplinary action, but Swiderski denies that was said in relation to Nick's filing a charge. The conversation ended with Swiderski telling Nick

[5] Nick's charge alleges a violation of Sec. 8(a)(1) and (3) of the Act, based on Nick's ''membership in and activities in behalf of Teamsters Union Local 516.''

that getting the Government and UPS involved was more serious than taking a matter to the union business agent. According to Swiderski, Scheffler was ''pretty quiet'' during the meeting (1:154–156).

Nick has filed grievances, and the Union has filed grievances on his behalf, totally about 15 in number (1:88, 93–94). Even so, Nick's version, supported by the testimony of Scheffler, is far more plausible than Swiderski's. Moreover, Nick and Scheffler testified with a persuasive demeanor, whereas the demeanor of Swiderski was unfavorable. I therefore find that the conversation occurred as described by Nick.

2. Discussion

When Nick expressed concern over his job because of having filed the instant charge, the charge Swiderski was interrogating Nick about, Swiderski told Nick his name was now ''in lights'' with UPS. Swiderski concedes he told Nick the charge was a ''serious'' matter by going beyond the center and involving UPS and the government.

Regardless of whether Swiderski intended a threat of unspecified reprisal by UPS over Nick's filing the instant charge, I find that his statement reasonably tends to convey just such a message. Swiderski's words are linked to Nick's expression of concern over his job and the filing of the charge. The logical and reasonable interpretation of Swiderski's statement is that which Nick placed on it—''That my job was in jeopardy.'' It is of no moment that Swiderski did not spell out when or how the ax would fall. Nick had recently received a written warning, and discharge could follow under article 49 of the collective-bargaining agreement. An ordinary employee could reasonably be expected to understand Swiderski's statement to mean that as a result of Nick's filing the charge everything Nick did from then on would be subjected to intense scrutiny for the purpose of finding the slightest mistake in order to discharge him. Swiderski's statement is coercive. Accordingly, I find UPS violated Section 8(a)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent, United Parcel Service, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 516 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent UPS constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), car washers, and United Parcel Service employees in the employer's air operation, excluding guards and supervisors as defined in the Act.

4. At all times since May 1, 1982, Teamsters Union Local 516 has been, and is, the exclusive representative of all the employees in the appropriate bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. UPS violated Section 8(a)(1) of the Act on February 24, 1988, when Tulsa Division Manager Walt Swiderski threatened Charging Party John Kenneth Nick, an employee, with retaliation of unspecified reprisals by UPS because Nick exercised his Section 7 right to file the unfair labor practice charge in this case.

6. Nick's stopping work and returning early on January 6, 1988, was unprotected even if he did so based on an honest and reasonable belief that road and driving conditions presented ''dangerous conditions of work'' within the meaning of article 18 of the collective-bargaining agreement.

7. UPS did not violate Section 8(a)(1) or (3) of the Act on January 14, 1988, by issuing a written warning letter to Charging Party Nick for his stopping work and returning to the center at noon on January 6, 1988.

8. The unfair labor practice found in Conclusion of Law 5 affects commerce within the meaning of Section 2(b) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, United Parcel Service, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to retaliate with unspecified reprisals against its employees if or because they choose to file unfair labor practice charges with the National Labor Relations Board against United Parcel Service.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Tulsa, Oklahoma centers copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.